UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,	12 Civ. 4034 (HB)
Plaintiff,	**ECF Case**
- v. -	
ALL RIGHT, TITLE AND INTEREST IN THE REAL PROPERTY AND APPURTENANCES THERETO KNOWN AS 35-37 EAST BROADWAY, NEW YORK, NEW YORK 10002 LISTED AS BLOCK 280, LOT 42 IN THE OFFICE OF THE COUNTY CLERK AND REGISTER OF NEW YORK COUNTY, NEW YORK,	
Defendant-*in-rem*.	

- x

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT BY PLAINTIFF UNITED STATES OF AMERICA

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PRELIMINARY STATEMENT

In this action, the Government seeks to forfeit a six-story Chinatown building located at 35-37 East Broadway, New York, New York (the "Defendant Property"), which was used continuously and extensively for more than two years by an illegal gambling business in violation of 18 U.S.C. § 1955. The undisputed facts demonstrate that this illegal gambling business operated in approximately half the spaces in the building, involving dozens of gambling operators and employees, hundreds of players, and tens if not hundreds of thousands of dollars a day. This business operated openly, both offering games in rooms with doors open to anyone in a public hallway of the Defendant Property, and through overt advertising in the form of a prominent sign above the entrance to the building. Moreover, it continued to operate in the building despite two separate intervening raids by law enforcement.

Claimants Won & Har Realty Corporation ("Won & Har"), the owner of the Defendant Property, TYT East Corporation ("TYT") the master tenant in possession during the relevant period, and David Gao ("Gao") and Hua Chen ("Chen"), two shareholders of TYT, all challenge the forfeiture. None, however, has put any facts in dispute regarding the presence of an illegal gambling business in the Defendant Property, and accordingly the Government moves for summary judgment finding the property subject to forfeiture as property used in an illegal gambling business under 18 U.S.C. § 1955(d). In addition, the Government seeks summary judgment dismissing the claims of TYT, Gao and Chen for lack of Article III standing. A warrant of eviction has issued against TYT in a state proceeding filed by Won & Har in response to this action, and therefore TYT lacks an interest in the Defendant Property. Gao and Chen, as mere shareholders of TYT, also lack a sufficient interest in the property.

In the event that the Court finds that TYT, Gao and Chen do have Article III standing, however, the Government also moves for summary judgment against their asserted affirmative defenses that they are innocent owners of the Defendant Property, on the grounds that they do not meet the statutory requirements to be "owners." Further, no reasonable jury could find that TYT was an innocent owner. The undisputed evidence shows that TYT had knowledge of gambling in the building and did not attempt to prevent it. More importantly, TYT's Chairman of the Board and other employees asserted their Fifth Amendment privilege against self-incrimination to avoid answering questions regarding their knowledge of gambling activities in the building, rendering TYT's assertion of ignorance untenable.

Finally, the Government seeks summary judgment rejecting Won & Har's affirmative innocent owner defense, in light of (1) Won & Har's failure to take all reasonable steps to prevent the use of its property for illegal gambling after learning that it was being used for that purpose in July 2011; and (2) its willful blindness regarding the obvious continuance of gambling in the building between July 2011 and May 2012. Even assuming the truth of the testimony of Won & Har's President, Damon Leong ("Leong"), it is clear that Won & Har took only minimal steps to prevent gambling in the building, admittedly did not know if those steps had resolved the problem, and yet failed to take any additional steps no matter how painless. After July 2011, Won & Far never took even the basic step of inquiring of TYT about gambling activity in the building or what TYT was doing to prevent it. Certainly, Won & Har did not engage in even the slightest independent effort to confirm that no gambling was occurring. Instead, Leong actively avoided learning what was happening in the building.

The conclusion that Won & Har was willfully blind in this matter is only confirmed by the fact that Won & Har did not know, and did not seek to learn, anything about TYT or its principals at the time it leased them the Defendant Property. Rather, the facts show that Won & Har was willing to ask no questions about TYT or its plans for the building, in return for the average annual rent of more than $1 million it was to receive over the 20 years of the lease, and the $1 million cash payment it received at the time the lease was executed. No reasonable jury could find that Won & Har had met its burden of proof on its innocent owner defense, and so summary judgment is appropriate as a matter of law.

For the reasons set forth below, the Government respectfully requests that the Court grant its motion for summary judgment on the forfeitability of the Defendant Property.[1]

PROCEDURAL HISTORY

This action was commenced when the Government filed a Verified Complaint seeking the forfeiture of the Defendant Property on May 22, 2012. Claims were filed by Won & Har, as owner of the building, TYT as lessee, and by Gao and Chen as shareholders of TYT. Won & Har, TYT and Gao have all files Answers including the assertion of an affirmative defense that they are innocent owners, and that the forfeiture of the Defendant Property would be an excessive fine under the Eighth Amendment.[2] (Answer of Won & Har at ¶¶ 13-14; Answer of David Gao at

[1] Once the forfeitability of the Defendant Property is established, it remains subject to a proportionality hearing pursuant to 18 U.S.C. § 983(g), to address Won & Har's assertion that the forfeiture of the entire Defendant Property would violate the Eighth Amendment.

[2] As noted above, Won & Har also included various other assertions styled as separate affirmative defenses, but the Government believes they are all factual assertions going to Won & Har's status as an innocent owner, rather than independent affirmative defenses. (Answer of Won & Har at ¶¶ 9-12, 15.)

¶¶ 16-17; Answer of TYT at ¶¶ 9-10.)[3] The Claimants have also asserted various cross-claims and third party actions against each other.

STATEMENT OF FACTS

Based on the pleadings, Claimants' answers to the Government's interrogatories, documents in the public record, and the evidence adduced thus far in discovery, the following is a summary of the undisputed facts[4] relevant to the Motion, as set forth in the Local Civil Rule 56.1 Statement of Undisputed Material Facts in Support of Motion for Summary Judgment by Plaintiff United States of America (cited as "56.1 Stmt. ¶ __"), filed in support of this Motion.

Won & Har Leases the Defendant Property to TYT

Before 2006, Won & Har was managed by Dung Leong, father of the current President Damon Leong. (56.1 Stmt. ¶ 8.) Leong replaced his father as President in 2006. (Id.) From the time Leong took over the business until the signing of a lease giving TYT control over the Defendant Property in October 2008 (the "Lease"), Won & Har lost three or four out of six or seven of its remaining, leaving it with only three tenants and half the property vacant. (Id. ¶ 9.) As a result, the Defendant Property was reduced to bringing in only a very small amount of money for Won & Har. (Id. ¶ 10.)

Won & Har entered into the Lease despite knowing literally knowing about TYT. At the time it agreed to the lease, Won & Har did not know what TYT's business was, who ran TYT, who worked for TYT, whether TYT had ever declared bankruptcy ever breached contracts, whether the principals of TYT had ever been arrested before, or whether TYT engaged in illegal activities of

[3] Chen appears not to have filed an Answer in this action in violation of 18 U.S.C. 983(a)(4)(B), and accordingly his claim should be dismissed.

[4] For purposes of this motion only, the Government accepts as true the deposition testimony of Won & Har's President, Damon Leong ("Leong").

any kind. (Id. ¶ 11.) Nor did Won & Har attempt to learn anything about TYT or its principals prior to entering into the Lease. (Id. ¶ 12.) Won & Har also had no knowledge of what TYT planned to do with the Defendant Property. (Id. ¶ 13.)

Won & Har agreed to lease the property to TYT despite this lack of knowledge because TYT met Leong's terms, which were that rent by approximately $1 million per year, and that the lease last for 20 years. (Id. ¶ 14.) The Lease provided for an average annual rent of approximately $1,044,000 a year, and for TYT pay all building expenses, leaving the rent as pure profit to Won & Har. (Id. ¶ 15.) TYT paid Won & Har more than $350,000 in deposits pursuant to the Lease. More significantly, TYT paid $1 million in cash to Won & Har in return for the Lease, which was not reflected in the Lease and related documents, or in Won & Har's 2008 U.S. Tax Return. (Id. ¶¶ 17-18).

The Defendant Property Is Used For Gambling For Nearly Two Years

As set forth in greater detail in the Government's Statement of Undisputed Facts and the supporting evidence cited therein, from July 14, 2010 until May 21, 2012, an illegal gambling business was in continuous operation at the Defendant Property despite law enforcement searches on March 15, 2011 (the "March 2011 Search") and July 19, 2011 (the "July 2011 Search"). (See id. ¶¶ 20-52). The gambling business at the Defendant Property offered mah jong, pai gow, 13-card poker, and versions of slot machine games played on computers ("computer slots"). (Id. at ¶ 24.) Table gambling took place in Suites 301, 302, 303, 305, 401, 402, 403, 408, 601, 602, 603, 604, 605, and 606, representing 14 of approximately 24 rooms on the four floors of the Defendant Property nominally set up as office space. (See id. at ¶¶ 1, 31, 33-34, 38, 45, 51.) Computer slots were offered in a room on the first floor (the "Computer Slots Room"). (Id. at ¶¶ 39-41, 45.)

In pai gow games, the players played against a "house" dealer, and the "house" also took a percentage of every bet. (Id. at ¶ 25.) "House" pai gow dealers won as much as $60,000 in a single pai gow game during this period. (Id.) In mah jong games, the players played against each other, and the "house" simply took a percentage of every bet. (Id. at ¶ 26.) The "house" percentage at 35-37 East Broadway was five percent. (Id. at ¶ 27.) For example, if an individual was betting $10,000, $500 would go to the "house." (Id.) Players at the gambling business at the Defendant Property frequently wagered thousands of dollars, and players in a given room would hold as much as $70,000 to $80,000 in total at a given time. (Id. at ¶ 28.) At a given time, up 30 to 40 people worked at the Defendant Property for the gambling business, including dealers, bankers, individuals who lent money to players with interest, and other supporting personnel. (Id. at ¶ 29.)

In the March 2011 Search, law enforcement arrested nine people working in the two rooms searched for promoting gambling, and seized over $20,000 in cash from each suite, including from the persons working in each suite. (Id. at ¶ 22.) In the July 2011 Search, law enforcement arrested seven people working in the six rooms searched for promoting gambling, and seized approximately $63,853 in unattended house money, approximately $16, 695 from the people arrested, and approximately $122,179 from other individuals present as players or workers, for a total of approximately $202,627. (Id. at ¶ 33.) In the May 2012 Search, law enforcement arrested nine people seven people for their role in the gambling business, HSI seized a total of approximately $6,408 in unattended house money, approximately $10,420 from the persons arrested by the NYPD, and approximately $60,024 from other individuals present as players or workers, for a total of approximately $76,852. HSI also seized 22 electronic mah jong tables, 13 other gambling tables, and 32 computers from the Computer Slots Room. (Id. at ¶ 52.)

Both Won & Har and TYT concede that they were aware of the July 2011 Search and the fact that it uncovered gambling activity. (Id. at ¶¶ 80-81.) Notably, not only did gambling continue in the Defendant Property after the July 2011 Search, it did so extremely openly. Table gambling was available during business hours in as many as seven suites at a time, at least some of which left their doors open allowing people standing in the public hallway to see that gambling was occurring. (Id. at ¶¶ 36-37, 45, 47-49.)

Between December 2011 and February 26, 2012, the Computer Slots Room was opened, and shortly thereafter a large sign (the "Lucky U Sign") was prominently displayed on the front of the Defendant Property above the entrance advertising the Computer Slots Room as "LUCKY U, 777," with dollar sign images scattered across the sign, and the statement "OPEN 24 HOURS." (Id. at ¶¶ 39-42.) At around the same time, a flyer for "Lucky U 777" (the "Lucky U Flyer") was attached to the glass entrance to the 37 East Broadway side of the Defendant Property. (Id. at ¶ 43.) The side of the Lucky U Flyer facing the street shows an image of a slot machine game and says, among other things, "Cash Back Games." (Id. at ¶ 43.) The side of the Lucky U Flyer facing the inside of the Defendant Property shows another image of a slot machine game, surrounded by a border made up of dollar signs and $50 bills and advertises large jackpots (Id.) During the May 2012 Search, large quantities of this flyer were found in the Computer Slots Room, and copies were also found on the floor of the first floor hallway. (Id. at ¶¶ 52-53.)

Won & Har's Response to the July 2011 Search

Won & Har became aware of the July 2011 Search when Leong heard from someone that it was reported in a Chinese-language newspaper. (Id. at ¶ 80.) Leong then Connie Chen, the TYT employee who managed the building. (Id. at ¶¶ 56, 81.) Leong told her that there was a newspaper article about illegal gambling in the building, and that TYT had to clean up the illegal gambling. (Id. at ¶ 81.) Chen stated that she would clean it up, but did not say how. (Id.) Leong also contacted his lawyer, and went to an NYPD precinct and asked which rooms were involved in gambling. (Id. at ¶¶ 82-83) On July 20, 2011, Won & Har's counsel sent a letter to the NYPD requesting the rooms or sub-tenants involved in the gambling activity. (Id. at ¶ 84) Won & Har then sent a Notice to Cure to TYT, stating that TYT was violating the terms of the Lease by sub-leasing suites 601, 603, 605 and 606 for illegal gambling purposes, and threatening to evict TYT if they did not cure the default. (Id. at ¶ 85)

On August 25, 2011, TYT sent Won & Har four Surrender Agreements by which the sub-tenants of suites 601, 602, 603 and 605 surrendered their leases. (Id. at ¶ 86.) At the time Won & Har received these Surrender Agreements, Won & Har admittedly did not know whether or not TYT was itself involved in the illegal gambling activities, or whether or not the problem of illegal gambling in the Defendant Property had been solved. (Id. at ¶¶ 87-88.) Despite not knowing whether the illegal gambling problem had been solved, Won & Har had not further communications with TYT about the illegal gambling that had occurred in the building, or what TYT was doing to prevent illegal gambling in the future. (Id. at ¶ 89.) Nor did Won & Har take any other action to investigate or prevent the use of the Defendant Property for illegal gambling, despite an admitted ability to have taken other steps to do so. (Id. at ¶¶ 93-95.)

The City Action

On October 4, 2011, the City of New York filed a public nuisance action (the "City Action") against Won & Har, the Defendant Property, and various "John Doe" defendants based on illegal gambling activities taking place in Suite 606 of the Defendant Property between December 1, 2010 and the March 2011 Raid. (Id. at ¶ 90.) In addition to the March 2011 raid, the Verified Complaint filed by the City cited illegal gambling activity observed by an undercover NYPD on December 1, 2010, January 11, 2011, and February 8, 2011. (Id.) Won & Har entered into a Stipulation of Settlement of the City Action dated November 22, 2011, in which Won & Har consented to be "permanently and perpetually enjoined from permitting the subject premises to be used or occupied for illegal gambling[.]" (Id. at ¶ 91.) TYT agreed to a similar stipulation. (Id. at ¶ 92.)

Won & Har's Willful Blindness After the July 2011 Search and the City Action

Having become aware of the extensive pattern of illegal gambling that had occurred in the Defendant Property since 2010, Won & Har deliberately closed their eyes to the obvious ongoing gambling activities. Even after the July 2011 Search and the City Action, Leong, the only representative of Won & Har to have any involvement with the Defendant Property after the Lease was signed, visited the Defendant Property continued to visit the property only once a month to collect rent. (Id. at ¶¶ 67, 70.) Leong would only go early in the morning, after making an advance phone call to TYT, and only directly to and from the TYT office. (Id. at. ¶¶ 68-69, 71.) Leong never looked at any of the signs on the exterior of the Defendant Property, and never noticed a single sign, including the Lucky U Sign. (Id. at ¶ 72) Indeed, Leong never walked even past the Defendant Property at any time except when he visited the Defendant Property to collect rent, despite his office being only three blocks away. (Id. at ¶¶ 73-74.) Leong never learned who worked at TYT aside from Connie Chen, and never learned who any of the sub-tenants in the building were. Aside from the day after the July 2011 Search, he never spoke to Chen about the Defendant Property or what was happening in it, because he didn't see a reason to as long as he was getting his rent check. (Id. at ¶ 79.)

Won & Har's Belated Eviction of TYT

On May 23, 2012, after the filing of the present action, Won & Har filed an action to evict TYT for allowing the use of its building in illegal gambling activities. (Id. at ¶ 96.) On August 31, 2012, a judgment of possession was issued in favor of Won & Har and against TYT, and on February 14, 2013, a warrant of eviction was issued against TYT. (Id. at ¶¶ 97-98.)

ARGUMENT

I. Summary Judgment Standard

Pursuant to Federal Rule of Civil Procedure 56(a), "[a] party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of the claim." Fed. R. Civ. P. 56(a). Under Rule 56(c), a court will grant a motion for summary judgment "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). "A fact is material . . . when it might affect the outcome of the suit under the governing law. An issue of fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Jeffreys v. City of New York, 426 F.3d 549, 553 (2d Cir. 2005) (internal citation and quotation marks omitted). In determining whether summary judgment is appropriate, the Court must draw all inferences in favor of the nonmoving party. United States v. Collado, 348 F.3d 323, 327 (2d Cir. 2003). The moving party meets its burden "by showing that little or no evidence may be found in support of the non-moving party's case." Gallo v. Prudential Residential Servs., 22 F.3d 1219, 1223-24 (2d Cir. 1994).

Once the moving party has provided sufficient evidence to support a motion for summary judgment, "the opposing party must proffer admissible evidence that 'set[s] forth specific facts' showing a genuinely disputed factual issue that is material under the applicable legal principles." Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 310 (2d Cir. 2008) (quoting Fed. R. Civ. P. 56(e)); see also Golden Pac. Bancorp. v. FDIC, 375 F.3d 196, 200 (2d Cir. 2004). The nonmoving party may not rely on conclusory allegations or speculation and must show that "its version of the events is not wholly fanciful." Morris v. Lindau, 196 F.3d 102, 109 (2d Cir. 1999). Evidence presented by the non-moving party that is so "blatantly contradicted by the record . . . that no reasonable jury could believe it" should not be accepted by the court for purposes of defeating a motion for summary judgment. Scott v. Harris, 550 U.S. 372, 380 (2007).

"[T]he mere possibility that a factual dispute may exist, without more, is not sufficient to overcome a convincing presentation by the moving party." Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438, 445 (2d Cir. 1980). Such a dispute is not "genuine," and the party opposing summary judgment must show that there is more than a "metaphysical doubt." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The non-moving party must "set forth specific facts showing that there is a genuine issue for trial." Id. at 587.

II. The Claims of TYT, Gao and Chen Should be Dismissed For Lack of Standing.

A. Applicable Law

"Whether a claimant has standing is 'the threshold question in every federal case, determining the power of the court to entertain the suit.'" United States v. Cambio Exacto, S.A., 166 F.3d 522, 526 (2d Cir. 1999) (quoting In re Gucci, 126 F.3d 380, 387-88 (2d Cir. 1997)). "In order to contest a governmental forfeiture action, claimants must have both standing under the statute or statutes governing their claims and standing under Article III of the Constitution as required for any action brought in federal court." Id. The goal of this requirement is "to ensure that the government is put to its proof only where someone with a legitimate interest contests the forfeiture." United States v. $557,993.89, More or Less, in U.S. Funds, 287 F.3d 66, 79 (2d Cir. 2002). The burden is on the claimant to demonstrate to the Court's satisfaction his statutory and constitutional standing. Mercado v. United States Customs Service, 873 F.2d 641, 644 (2d Cir. 1989).

"To demonstrate standing under [*7] Article III ... a litigant must allege a distinct and palpable injury to himself that is the direct result of the putatively illegal conduct of the adverse party and likely to be redressed by the requested relief." Cambio Exacto, 166 F.3d at 527 (internal citations and punctuation omitted). Generally, an ownership or possessory interest in the seized or forfeited property is what is required in order to establish Article III standing in civil forfeiture actions, though injury to the claimant remains the "ultimate focus." Id. Ownership and possessory interests are defined by state law. Ciambriello v. County of Nassau, 292 F.3d 307, 313 (2d Cir. 2002).

B. TYT Has No Interest in the Defendant Property Following the Issuance of a Warrant of Eviction Against It.

TYT has no interest in the Defendant Property, and therefore no standing to contest its forfeiture, as a result of the Eviction Proceeding. "[T]he issuance of a warrant of eviction annuls the landlord-tenant relationship, extinguishing any possessory rights of the tenant in the premises that had arisen by virtue of the tenancy." Radol v. Centeno, 165 Misc. 2d 448, 450-451 (N.Y. Civ. Ct. 1995) (holding tenant had no interest for purposes of bankruptcy proceeding in premises where warrant of eviction had been issued); see also N.Y. RPAPL § 749(3). A state court has issued both a judgment of possession in favor of Won & Har, and a warrant of eviction against TYT. Accordingly, TYT's interest in the property has been extinguished, and it can suffer no additional injury from the outcome of the forfeiture proceeding. Therefore, the Court should dismiss TYT's claim for lack of standing. See Cambio Exacto, 166 F.3d at 526.

C. Gao and Chen Cannot Assert Claims Based on Their Status as Shareholders of TYT.

Gao's and Chen's claims to 35-37 East Broadway are based exclusively on their status as shareholders of TYT. (Gao Claim; Chen Claim.) Obviously, to the extent TYT lacks standing as set forth above, Gao and Chen would similarly lack standing. Even if TYT did have standing, however, courts have consistently found that because shareholders lack an ownership interest in any specific property belonging to a corporation, shareholders lack standing to challenge the forfeiture of a corporation's assets. See, e.g., United States v. Real Prop. Known as 479 Tamarind Dr., No. 98 Civ. 2279 (DLC), 2011 WL 1045095, *2 (S.D.N.Y. March 11, 2011) ("A shareholder has no standing to contest the forfeiture of an asset of a corporation because shareholders do not have an ownership interest in any specific property owned by that corporation.") (Cote, J.); United States v. Real Prop. Known as 479 Tamarind Dr., No. 98 Civ. 2279 (RLC), 2005 WL 2649001, at *4 (S.D.N.Y. Oct. 14, 2005)(Carter, J.); The New Silver Palace Restaurant, 810 F. Supp. 440 (E.D.N.Y. 1992); United States v. Real Prop. Associated with First Beneficial Mortgage Corp., No. 3:08cv285, 2009 WL 1035233, *4 (W.D.N.C. Apr. 16, 2009); United States v. Two Bank Accounts, Nos. CIV 06-4016-KES, 06-4005, 2008 WL 5431199, *5 (D.S.D. Dec. 31, 2008); United States v. East Carroll Corr. Sys., 14 F. Supp. 2d 851, 853-54 (W.D. La. 1998). This is consistent with the general principle of American corporate law that "the corporation and its shareholders are distinct entities . . . . An individual shareholder, by virtue of his ownership of shares, does not own the corporation's assets . . . ." Dole Food Co. v. Patrickson, 538 U.S. 468, 474-75 (2003). Accordingly, Gao and Chen cannot demonstrate that they have standing in this action.

III. The Defendant Property Is Subject to Forfeiture Under 18 U.S.C. § 1955.

A. Applicable Law

The Civil Asset Forfeiture Reform Act of 2000 ("CAFRA"), codified in part at 18 U.S.C. § 983, sets forth the procedures governing civil forfeiture actions, including for actions under 18 U.S.C. § 1955. *See* 18 U.S.C. § 1955(d). Once a claimant's standing is established, the Government bears the initial burden of proof in a civil forfeiture matter "to establish, by a preponderance of the evidence, that the property is subject to forfeiture" 18 U.S.C. § 983(c). Title 18, United States Code, Section 1955 provides that [a]ny property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States." 18 U.S.C. § 1955(d). Because the Government seeks forfeiture of the Defendant Property based on its use in criminal activity, it must also "establish that there was a substantial connection between the property and the offense." 18 U.S.C. § 983(c).

Section 1955 "makes it illegal to 'conduct[], finance[], manage[], supervise[], direct[], or own[] all or part' of a gambling business which 1) violates the law of a state, 2) involves five or more people, and 3) has been in substantially continuous operation for more than 30 days or has gross revenue of more than $ 2,000 in any single day." United States v. Fitzsimmons, 02 Crim. 1066 (HB), 2003 WL 1571708, *1 (S.D.N.Y. Mar. 26, 2003). Under New York law, gambling activity is unlawful unless it is "specifically authorized by law," and, among other gambling offenses, it is a crime to "knowingly advance[] or profit[] from unlawful gambling activity." N.Y. Penal Law §§ 225.00(12), 225.05.

B. The Defendant Property Was Used In Violation of Section 1955.

For almost two years, an extensive illegal gambling business operated out of the Defendant Property. Mah jong, pai gow, 13-card poker, computer slots games were constantly offered to large numbers of gamblers in in locations throughout the Defendant Property between July 14, 2010 and May 21, 2012. (56.1 Stmt. ¶¶ 20-52). The operation of these activities in the Defendant Property for such an extended period clearly constitutes not only "use" of the Defendant Property by those conducting the business, but also a "substantial connection" between the Defendant Property and the business. Betting on mah jong, pai gow and 13-card poker also obviously constitutes gambling activity under New York law, and such gambling activity has never been "specifically authorized" by any New York law. Therefore, the gambling business using the Defendant Property met the first element of Section 1955 by violating New York law.

Nor is there any question that the gambling business in the Defendant Property involved five or more people, satisfying the second element of Section 1955. The gambling operations involved as many as 30-40 persons working at a given time, and frequently operated in as many as eight separate suites in the Defendant Property at the same time. (See 56.1 Stmt. ¶¶ 29, 38-39, 45.) Further, in connections with the three searches of the Defendant Property carried out by law enforcement, the NYPD arrested more than 20 people for their involvement with the gambling business. (Id. ¶¶ 22, 35, 52.)

The business has also been in substantially continuous operation for almost two years, far more than the 30 days required to satisfy the final element of Section 1955. In the alternative, the undisputed facts also prove that the business grossed far more than $2,000 a day on average, let alone on a single day. Three searches by law enforcement agents resulted in the seizures of unattended cash belonging to the "house" and cash held by arrested participants in the business amounting to approximately $17,000, $40,000, and $80,000. (Id.) As those searches were conducted before the end of any given day, and would have missed any funds removed from the Defendant Property during the course of the day, the amounts seized are more than sufficient to prove by a preponderance of the evidence that the business generated daily gross revenues in the tens of thousands of dollars.

As the gambling business operating in the Defendant Property meets all the elements of Section 1955, the Court should find the Defendant Property subject to forfeiture under Section 1955.

IV. No Reasonable Jury Could Find That Won & Har Is an Innocent Owner.

A. Applicable Law

Where a claimant asserts an innocent owner defense, "[t]he claimant shall have the burden of proving that the claimant is an innocent owner by a preponderance of the evidence." 18

U.S.C. § 983(d). "A claimant may assert an innocent-owner defense where his property interest existed at the time of the conduct giving rise to forfeiture if he 'did not know of the conduct giving rise to forfeiture,' or, 'upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property.'" United States v. One Tyrannosaurus Bataar Skeleton, 12 Civ. 4760 (PKC), 2012 WL 5834899, *5 (S.D.N.Y. Nov. 14, 2012) (quoting 18 U.S.C. § 983(d)(2)(A).).

When a claimant bases his innocent owner defense on lack of knowledge of the illegal activity, he must also establish that he was not willfully blind to the activity. See United States v. One Parcel of Property Located at 755 Forest Road, 985 F.2d 70, 72 (2d Cir. 1993) ("where an owner has engaged in willful blindness as to activities occurring on her property, her "ignorance will not entitle her to avoid forfeiture"); United States v. All Funds Presently on Deposit, 832 F.Supp. 542, 564 (E.D.N.Y.1993) ("claimant must demonstrate by a preponderance of the evidence that it...was not willfully blind to those activities.") Where a claimant admits knowing that his property had been used for illegal activity, he must prove that "every action, reasonable under the circumstances, was taken to curtail" the illegal activity, which the Second Circuit has characterized as "a significant burden upon owners to remain accountable for the legitimate use of their property." United States v. Two Parcels of Property Located at 19 and 25 Castle Street, 31 F.3d 35, 39-40 (2d Cir. 1994) (quoting United States v. 418 57th Street, 922 F.2d 129 (2d Cir. 1990).

B. Won & Har Did Not Take All Reasonable Actions To Terminate the Use of the Defendant Property for Illegal Gambling.

Won & Har's response to learning of illegal gambling activities in the Defendant Property after the July 2011 Search cannot be found to include all actions reasonable under the circumstances. Won & Har took the following steps: (1) called a TYT employee and told her to clean up the illegal gambling without asking a single question about that activity; (2) consulted with counsel; (3) identified the specific suites where the NYPD had found gambling activity on July 19, 2011; (4) demanded that TYT remove the sub-tenants from those suites; and (5) received notices from TYT indicated that sub-tenants had vacated those suites. Having taken these steps, Leong expressly admitted Won & Har did not know whether they had actually solved the problem of illegal gambling in the Defendant Property, or whether TYT was involved in that gambling. (56.1 Stmt ¶ 87-88.) Yet, even setting aside more significant steps, Won & Har failed to ask a single question of TYT regarding the circumstances surrounding the illegal gambling activities or what they planned to do to prevent illegal gambling in the future. (Id. at ¶ 89.)

Nor did Won & Har, through Leong, take even the simplest and most insignificant of steps to confirm that no gambling was occurring, including a wide variety that Leong admitted he could have easily done. Leong could have gone to the other floors, or looked around the first floor, during his once a month rent collection to see if there was any sign of gambling activity. (Id. at ¶ 95) He could have gone to the building at other times. (Id.) He could have read the signs outside the building to see if there were any obvious gambling advertisements. No reasonable jury could find that it was reasonable for Won & Har to neglect these most basic, painless steps to confirm that gambling activity had been removed from the building.

This is particularly true in light of the City Action. By October 2011, Won & Har was aware that illegal gambling in the building had not been an isolated incident, but rather had been ongoing for at least eight months. (Id. at ¶ 90.) At that point, Won & Har could not have reasonably believed that TYT could be relied on implicitly to prevent gambling in the future. Moreover, Won & Har had been expressly enjoined from permitting illegal gambling in the building, above and beyond its ordinary duties under the law. (Id. at ¶ 91.) In light of the new information and the new obligation arising from the City Action, any reasonable owner would, at the minimum, have asked TYT whether there had been any signs of gambling activity, and what TYT was doing to prevent such activity. Won & Har, by contrast, asked no questions and took no actions to ensure that the Defendant Property was no longer being used for gambling activity.

The case Second Circuit's decision in United States v. Two Parcels of Property Located at 19 and 25 Castle Street, is instructive. There two parents and three children resided in a three floor multi-family residence Two Parcels, 31 F.3d at 37. The property was used by the children to possess and distribute narcotics, leading to a forfeiture action. Id. at 37-38. Having found that the parents had known that their children had possessed narcotics on the property, the Court addressed whether they taken all reasonable steps to prevent such use of their property. The Court found that the parents had not done so, despite the fact that they, inter alia, reported narcotics activity on the street to the police, despite retaliation from narcotics dealers, and despite the fact that the children admittedly hid their narcotics from their parents, and repeatedly lied to them regarding their narcotics activities. (Id. at 37-38, 40.) In so finding, the Court noted that one of the reasonable actions the parents failed to take was to "conduct searches of the residence parcel to check for narcotics, despite knowing that their children previously had possessed narcotics there." (Id. at 40.)

The Tenth Circuit reached a similar conclusion in United States v. 16328 South 43rd East Ave., 275 F.3d 1282 (10th Cir. 2002). There, the Government was granted summary judgment finding that a woman was not the innocent owner of a farm, 15 miles away from her own residence, where her son had grown large quantities of marijuana. 16328 South 43rd East Ave., 275 F.3d at 1283-84. The Court upheld the grant of summary judgment, first finding that the mother was, at best, willfully blind to the cultivation of marijuana on her property, which she rarely visited. Id. at 1285-86. The Court then determined that she had not taken all reasonable actions to prevent such cultivation, when, among other things, she had threatened her son with eviction if he continued to grow marijuana on her property and made as extensive an inspection of the property for marijuana as she was physically capable of performing. Id. 1285-86. The Court found that, "at the very least, Ms. Scott could have investigated the property more thoroughly to determine whether marijuana was in fact growing there," and suggested she could have enlisted the assistance of a third party if she was physically unable to do so on her own. Id. at 1286.

In short, the reasonable steps a landlord must take to preserve an innocent owner defense, once alerted to illegal activity on their property, include thoroughly searching the property for signs of the illegal activity. This is true even when the landlord has risked physical retaliation by reporting related illegal activity in the past, or when the landlord is physically incapable of personally performing the requisite search. Furthermore, the courts have applied this rule in the case of individual landlords dealing with their own children. It applies all the more strongly here, were Won & Har is a corporate landlord renting a commercial space for a large profit to another corporation.

Won & Har plainly failed to meet this standard. Where the parents in Two Parcels and 16328 South 43rd East Ave were faulted for not undertaking a thorough search, here Won & Har failed even to ask a single question, or to make the most preliminary, informal inspection. Instead, as discussed further below, Won & Har deliberately closed its eyes to the gambling business openly operating in the Defendant Property. Accordingly, no reasonable jury could find that Won & Har had met its burden to prove that it took all reasonable steps to terminate the use of the Defendant Property for illegal gambling.

C. Won & Har Was Wilfully Blind to Illegal Gambling Activity in the Defendant Property Following the July 2011 Search.

"The principle that willful blindness is tantamount to knowledge is hardly novel." Tiffany (NJ) Inc. v. eBay, Inc., 600 F.3d 93, 110 n. 16 (2d Cir.2010) (cases); A person is "willfully blind" or engages in "conscious avoidance" amounting to knowledge where the person "'was aware of a high probability of the fact in dispute and consciously avoided confirming that fact.' " United States v. Aina-Marshall, 336 F.3d 167, 170 (2d Cir.2003) (quoting United States v. Rodriguez, 983 F.2d 455, 458 (2d Cir.1993).

Plainly, once Won & Har learned of the July 2011 Search, it was aware of a high probability that there was gambling activity taking place in the Defendant Property. This probability was only reinforced by the information revealed to Won & Har in the City Action. Moreover, the gambling activity in the building was advertised openly on the Lucky U Sign and through the Lucky U Flyer, and the gambling business was operating entirely openly both in the Computer Slots room, and on the third, fourth and sixth floors. Won & Har's response was to consciously avoid confirming that gambling continued to occur in the building through a classic display of willful blindness. Leong, the sole Won & Har employee to concern himself with the building, continued to go to the building only once a month, only after an advance phone call to TYT, only early in the morning, and only directly to and from the TYT office. (See id. ¶¶ 68-71.)

Even within those narrow constraints, Leong took care not to see or learn was going on in the building. He never looked at a sign on the exterior of the building, never spoke to anyone from TYT about either gambling in the building or even the building in general, never learned the identity of any TYT employees except Chen, and never learned the identity of any sub-tenants. (See id. ¶¶ 66-68, 72, 77-79, 89.) Indeed, Leong made sure to never walk past the Defendant Property at any time, unless he was collecting rent, despite the fact that the Won & Har office is a mere three blocks away from the Defendant Property. (Id. at 73-74.) And as noted, above, Won & Har declined to ask TYT a single question at any time after the Notice to Cure was sent about whether gambling was still occurring in the building or what was being done to prevent it. "Only a landlord who wished to intentionally remain ignorant of events in his buildings would engage in such disinterested behavior." United States v. All Right Title and Interest in 16 Clinton Street, 785 F.Supp.1157 (S.D.N.Y. 1992) (rejecting innocent owner defense).

That Won & Har was wilfully blind is further confirmed by its conduct in leasing the Defendant Property to TYT in the first place. In doing so, Won & Har was leasing its building to an entity it admittedly knew absolutely nothing about. In return, it received a $1 million, off the books, cash payment by TYT, more than $350,000 deposit, and the promise of an average of more than $1 million in pure profit a year for 20 years. (56.1 Stmt. ¶¶ 13-18.) All this when Won & Har had lost half its tenants and was generating only "a very small amount" of rent. (See id. ¶¶ 9-11) Won & Har chose not to take a single step to learn a single fact about TYT, except the money it was willing to pay and the lease term over which it was willing to pay it. (Id. at ¶12, 14.) This included failing to learn, before agreeing to and entering into the Lease, what TYT planned to do with the Defendant Property that could generate enough revenues to afford an annual rent of more than $1 million plus all building expenses. (Id. at ¶13.) Naturally, given its ignorance of TYT, Won & Har did not know the source of the $1 million in cash which TYT paid Won & Har or whether it was derived from legitimate sources.

In short, at this time Won & Har knew nothing except that an unknown company was willing to pay a suspiciously large amount of cash, and a huge amount of rent, for a no-questions-asked lease. Won & Har chose not to ask any questions, but to take the money and let TYT do what they wanted with the Defendant Property. The Government concedes that, drawing all inferences in Won & Har's favor, Won & Har was not yet aware of a high probability of illegal gambling activity in the Defendant Property prior to the July 2011 Search, as required to find it willfully blind before that event. The clear evidence of Won & Har's general willingness to avoid learning anything about TYT and its handling of the Defendant Property, however, does reinforce the unavoidable conclusion that Won & Har was willfully blind once it became aware of the high probability of gambling activity.

For all these reasons, no reasonable jury could find that Won & Har had proven by a preponderance of the evidence that it was not willfully blind to the obvious and extensive gambling activity still taking place through May 2012, or that it took all reasonable steps to terminate the use of the Defendant Property for illegal gambling following the July 2011 Search. Accordingly, the Court should grant summary judgment in favor of the Government.

V. TYT, Gao and Chen Lack A Sufficient Ownership Interest in the Defendant Property to Assert an Innocent Owner Defense.

Even assuming TYT, Gao and Chen had adequate Article III standing to pursue claims in this action, they may not assert an innocent owner defense because they lack a sufficient ownership interest. An "owner" for purposes of the innocent owner defense means a person with "an ownership interest in the specific property sought to be forfeited," and does not include a person with only "a general unsecured interest in, or claim against, the property or estate of another." 18 U.S.C. § 983(d)(6); see also United States v. 74.05 Acres of Land, 428 F.Supp.2d 57, 65 (D.Conn. 2006) (claimant with only equitable interest in property "does not meet the definition of "owner" under § 983(d)(6) and therefore does not have statutory standing as an innocent owner.) Even if TYT, Gao and Chen had retained some kind of the equitable interest in the property, they could not assert an innocent owner defense.

VI. No Reasonable Jury Could Find That TYT Is an Innocent Owner.

Even assuming TYT had both Article III standing and an adequate ownership interest to assert an innocent owner defense, no reasonable jury could find that TYT had met its burden. Obviously TYT, with employees and officers permanently working in the building, could not possibly have been unaware of the gambling activity openly occurring. Moreover, the contents of a file found in TYT's office show that TYT was well aware, if not complicit, in the computer slots gambling. (56.1 Stmt ¶¶ 63-65.) Most fundamentally, however, TYT cannot prove that it is an innocent owner because its officers and employees invoked their Fifth Amendment right not to answer numerous questions going directly to the issues on which TYT bears the burden of proof. Two invocations by Ni Ji Xiong, Chairman of the Board of TYT, suffice to negate TYT's innocent owner defense. Ni invoked his Fifth Amendment right to refuse to answer the questions: "what do you know about the use of the 35-37 East Broadway for gambling?" and "what action did you take in response to the allegations that 35-37 East Broadway was being used for gambling?" (Wilson Dec. Ex. 9 at 71-72.) These questions call expressly for Ni's knowledge about gambling activity in the Defendant Property, and his actions in response to learning of illegal gambling in the Defendant Property, the two prongs of the innocent owner defense. It is well settled that, in a civil proceeding, an adverse inference may be drawn against a party by that party's invocation of the Fifth Amendment privilege. Baxter v. Palmigiano, 425 U.S. 308 (1976); United States v. Ianello, 824 F.2d 203, 208 (2d Cir. 1987). More to the point, however, absent a denial by TYT's principal that he lacked knowledge of gambling in the building or took steps to prevent it, it is literally impossible for TYT to meet its burden of proof on an innocent owner defense.

CONCLUSION

For all of the above-state reasons, the Government's motion for summary judgment of forfeiture in this action should be granted.

Dated: New York, New York
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